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No more difficult problem of government exists than the effort to subject all property equally to the burdens of taxation. The most lamentable weakness in the whole system of taxation is that upon personal property. The statement can be made without fear of contradiction that the great majority of taxpayers make no return whatever on mortgages, bonds and other intangible securities. This practice of evasion, seemingly legitimated by the unanimity with which it is practiced were it not for the strict oath still required to be taken, practically exempts the holders of these securities from taxation.

An effort has recently been made in the city of Chicago to meet this weakness and failure of the tax system by encouraging the taxpayers of the city to report any discrepancy in their neighbor's return of personal property. The newspapers of Chicago took up the idea with avidity and succeeded in making up several sensational "scoops" over the affair, and withal the result was quite successful at least from the city assessor's standpoint. "Some kind friend," as the informant of the assessor was invariably referred to, was quite active all over the city. One man's assessment was raised from nothing to twelve thousand dollars, and one lady who was congratulating herself on escaping taxation was assessed on information of "some kind friend" for two hundred and fifty thousand dollars, the value of certain stocks and bonds held by her. These are but examples of many increases of assessments ranging from one thousand to one hundred thousand dollars.

That the result of this experiment is not everywhere regarded as an enthusiastic success, we note the recent comment of the St. Louis *Post-Dispatch* as follows:

"The success of the higgledy-piggledy, called the tax system, has come to depend upon 'some kind friend.' He is the uncommissioned attache of the assessor's office. This some 'kind friend is no doubt a very useful person. He should be suitably rewarded with money enough to keep him from want, and the hearty contempt of all decent people. But what kind of a 'system' is it that can be made to work, even roughly, only by resorting to espionage, treachery and plain sneaking; which puts a premium upon perjury; tempts men to spy upon one another, and surrounds friends with an atmosphere of mutual suspicion. Considerations of even the lowest plane of morality require a reform in this formless system. If enough thought is given to the subject it can be reduced to reason and order."

Undoubtedly the present system of taxation has resulted in dulling and debauching the moral sense of the people. It puts a tax on honesty and a premium on the most unscrupulous liar. It is not necessary, however, to offer proof of the utter failure of this system. No fact is better known nor more thoroughly regretted by the people. They simply await the suggestion of a remedy. Of the many suggestions for the solution of this difficulty which have so far been offered, three stand out with special prominence—the single tax, the income tax and the graduated business tax. The latter suggestion contemplates an assessment on the amount of sales or gross earnings of all business enterprises.

It is not our province, however, to advocate any particular suggestion, such questions partaking more of a political than of a legal nature, but we desire to call attention of the bar to the serious aspect which the question is rapidly taking and the natural attitude of the American people in looking to the legal profession for a practical solution of difficulties of this character rather than to the theoretical speculations of political scientists and public economists.

A dangerous advance of paternalistic tendencies is noticeable in the frequent successful attempts of legislatures to enact sumptuary laws under the vague, uncertain and seemingly all-comprehensive authority of the police power. An instance of this is to be noted in the case of State v. Crescent Creamery Co., 86 N. W. Rep. 107, where the Supreme Court of Minnesota held that section 7002 of the General Statutes of 1894, which prohibits the sale of cream that contains less than twenty per centum of fat, is a valid exercise of the police power and therefore

constitutional. It is the general concensus of opinion that it is not the proper function of government to regulate the morals and conduct of its citizens in their relations and intercourse with one another by sumptuary legislation;—its sole legitimate object is to protect them in their life, liberty and property. Beyond what is necessary for this protection the greatest freedom of contract and of business dealings is to be permitted. Sumptuary legislation makes the government the parent of a great family and its citizens nothing but weaklings under its custody and control, whereas, in its true aspect, it should be nothing but the servant and retainer of a strong people. The police power, therefore, as an attribute of sovereignty, is to be used only for the purpose of affording protection to the life, liberty and property of the whole community, and not for the prevention of fraud or unfair dealings between individuals. In the adulteration of food products this distinction can be easily recognized. There is first that adulteration of food products which is injurious to the general health and that which is not. In the former case the adulteration endangers the life of the community and is a proper subject of legislative regulation under the police power. In the second class of cases, where no injury to the health or life of the community is threatened, and especially, as is often the fact, where the adulterated product is itself beneficial and wholesome, little reason and authority can be seen for the interference of the legislature any more than in any of the other innumerable instances in which man takes advantage of his neighbor by misrepresentation and fraud. The ordinary remedies at law are sufficient to protect and compensate the unfortunate victim in such cases, and where the law affords no remedy, the stern rule of *caveat emptor* impresses him with the fact that this life is in large measure the survival of the fittest, in which to be successful all the senses must be awake and active, and prevents him from falling into that languid dependence upon the strong arm of the government, which is so disastrous to all ambition and achievement.

NOTES OF IMPORTANT DECISIONS.

HUSBAND AND WIFE — "FAMILY EXPENSE STATUTES"—LEASE.—Of late years there has been an increasing reaction against the earlier tendency in this country of surrounding the debtor who was a man of family with almost insurmountable barriers in the way of special privileges and exemptions. The belief is growing that the creditor has some rights which ought to be respected and enforceable even against heads of family, and especially creditors who have provided the family with the necessaries of life. Illinois has a statute which looks in this direction. It provides as follows:

"The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued, jointly and separately."

The U. S. Circuit Court of Appeals was recently called upon to construe this statute in the case of Walker v. Houghteling, 107 Fed. Rep. 619, where they held that where a house was rented to defendant under a written lease signed by defendant, and the premises were occupied as a dwelling by defendant and wife, the contention that an action could be maintained only on the lease, and against defendant alone, because the instrument was in writing and signed by defendant, and not as an action for use and occupation, under the statute, against defendant and wife, could not be sustained, since the statutory action was not merely remedial, but created a liability against the husband and wife, independent of any relation of landlord and tenant. The court said in part:

"The family expense statute under consideration, on the contrary, is not simply remedial. It creates a right in favor of the creditor, and a liability against the husband and wife. It introduces into the law a new character of obligation. It is, in no sense, an additional method of enforcing the relation of landlord and tenant, which was the sole purpose of the common-law action for use and occupation. The existence of the lease, in an action like this, is, of course, a material fact. It tends to show the value of the use and occupation. It may, by virtue of its force as a contract, set a limitation upon the amount that can be recovered. But it is not the basis of the suit. The suit is founded upon the provision of the statute that the wife, as well as the husband, shall be liable for family expense; and upon the fact that the use of a dwelling house is, within the meaning of this statute, a family expense. The circumstance that the subject-matter is the use and occupation of real estate is an incident only; the determinative fact is that, like flour and groceries, this use was for family purposes."

HOMESTEAD — INVESTMENT OF PROCEEDS OF SALE OF HOMESTEAD.—An interesting question in the law of homestead recently arose for decision in the case of Chamberlain v. Leland (Tex.), 62 S. W. Rep. 740. In this case defendant and wife occupied town property as a homestead, and

after the death of the wife, and defendant was no longer the head of a family, he sold the homestead, and moved on a 2,200-acre tract which he owned, and applied the proceeds of the homestead to the payment of a mortgage on that tract, and thereafter sold 2,000 acres of it, but continued to reside on the remaining 200. *Held*, that defendant was not entitled to a homestead in the 200 acres. The court said in part:

"At the time Leland sold his city homestead, it was exempted from forced sale, although he was not then the head of a family, because it had been exempted during the existence of his family, which was dissolved by death of his wife and the majority of his son. Under the rule laid down in Taylor v. Boulware, 17 Tex. 74, the exemption continued to Leland, notwithstanding the family was extinct. When Leland moved upon the 200 acres of land now claimed for a homestead, he could not acquire an exemption in that place, because he was not then the head of a family, unless it be true that his former homestead was in fact converted into and became the land now claimed by him. In the case of Schneider v. Bray, 59 Tex. 668, the owner of the homestead exemption, a widow, whose family was dissolved by the death of her husband, exchanged the exempted homestead for a place in Blossom Prairie, in Lamar county, Tex., with the intent to immediately occupy it as a home, and did in fact move upon it as such, and continued to reside thereon. This court held that the home which was acquired in exchange for that which was exempted took the place of the former homestead, and was itself protected from forced sale. In the case of Watkins v. Davis, 61 Tex. 414, a widow whose family had consisted of herself and husband continued to occupy the homestead after the death of her husband, and, contemplating the purchase of the land in suit, sold her home, and invested the money received, in the new home, to which she immediately removed, and continued to occupy as a home. The court held that this was, in effect, an exchange of one place for the other; that it came within the rule announced in Schneider v. Bray, and the new homestead was exempted from the claims of creditors. In the case before the court, Leland owned the land in controversy before he sold his homestead. Consequently he did not exchange his home in the city for the land sought to be protected from sale, as was the case in Schneider v. Bray. Neither did he buy the property now in question with the proceeds of the home which he had in Waco, as in Watkins v. Davis. It follows that the property now claimed by him does not represent that which he had previously occupied, and the facts of this case bear no such analogy to the cases cited above as will justify the application of the same rule of law to the decision of this case. We are of the opinion that the cases of Schneider v. Bray and Watkins v. Davis, before cited, have gone quite far enough in that direction, and should mark the limit of the rule of law announced in those cases."

CORPORATIONS—SALE OF ASSETS—RIGHTS OF CREDITORS.—An interesting discussion on the right of a corporation to sell its assets to another company in fraud of its creditors is to be noticed in the recent case of Hurd v. New York Laundry Co., 60 N. E. Rep. 327, where the New York Court of Appeals held that a corporation cannot, where the rights of a creditor have intervened, with the consent of its stockholders, sell its plant and retire from business, taking the stock of the purchasing corporation in payment therefor, such stock being issued to an individual stockholder, without any agreement on his part to pay the corporate debts. The court said:

"Stripped of all speculations and assumptions, we have here the case of a corporation which is in debt. While so indebted its officers enter in to an agreement under which substantially all its of assets are transferred to another corporation, which is thereafter to continue the business. In payment of this transfer the purchasing corporation issues some of its capital stock, not to the selling corporation, nor yet to its officers as trustees, but to the principal stockholder as an individual. When the creditor undertakes to assert his rights the stock is reissued to the late treasurer of the selling corporation, who has become the president of the purchasing corporation, and he distributes the same without regard to the claims of creditors. This is the transaction that is sought to be defended under the authority of Holmes & Grigg Mfg. Co. v. Holmes & Wessel Metal Co., 127 N. Y. 252, 27 N. E. Rep. 831. The statement in the opinion in that case, to the effect that a corporation has power, with the consent of all of its stockholders, to sell its plant to another corporation and to retire from business, taking payment in the stock of the other corporation, was entirely correct as qualified by the facts before the court. No rights of creditors intervened, the stockholders had all consented, and the question arose between the parties to a promissory note given for some of the stock. Here we have an entirely different condition of things. The stockholders consent, but the creditor objects. When he demands payment of his claim he is referred to the empty shell, which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his debt at the time of its creation. When he seeks to follow this fund, he is told that the capital stock of the defendant in the hands of those who may be *bona fide* holders is his only resort. This is not the law. In the recent case of Cole v. Iron Co., 133 N. Y. 164, 30 N. E. Rep. 847, Judge Finch, speaking for this court, said: 'As against the creditor, the transfer to the Millerton Company was illegal and in fraud of his rights. The assets of a corporation are a trust fund for the payment

of its debts, upon which the creditors have an equitable lien, both as against stockholders and all transferees, except those purchasing in good faith and for value. Bartlett v. Drew, 57 N. Y. 587; Brum v. Insurance Co. (C. C.), 16 Fed. Rep. 143; Mor. Priv. Corp. § 791. The Millerton Company was not such a purchaser. It parted with nothing. It knew and participated in the illegal purpose to destroy the National Company, to make it utterly insolvent, and to deprive its creditors of the trust fund upon which they had the right to rely, and so they were at liberty to set aside the transfer so far as it barred their remedy, and to enforce their equitable lien upon the property in the hands of the transferee.'"

THE NON-LIABILITY OF CHARITABLE AND ELEEMOSYNARY INSTITUTIONS FOR NEGLIGENCE CAUSING PERSONAL INJURIES OR DEATH.*

Missionary Societies, Churches and Cemeteries.—With respect to corporations created for the promotion of religion and benevolence by the establishment of hospitals, asylums and other institutions, within whose walls persons inclined to a life of charitable works may follow that life by caring for and relieving pain and disease, and wherein the gifts of private benevolence are accumulated for the purpose of organizing such relief upon some definite plan and with a veiw to the perpetuity of the relief dispensed, substantially the same immunities and exemptions have been extended by the courts as in the case of charitable institutions maintained by state, city and county taxation. Individual and collective private philanthropy and benevolence are encouraged upon like grounds of public policy. It is said in support of such immunity, first, that if a liability were admitted the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent as the result of negligence for which he was in no wise responsible; and second, that since the trustees cannot divert the fund by their direct act from the purposes for which it was donated, such fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund or their agents or employees.

I find that in one instance immunity from liability in tort was extended to a missionary society, but this seems to have been, in part at least, in consequence of certain statutory provisions directing that the rector, warden and vestrymen, or the trustees, consistory, or session, of any church, congregation or religious society, incorporated under the laws of New York, shall administer the temporalities thereof and hold and apply the estate and property belonging thereto, and the revenues of the same, for the benefit of such corporation, according to the rules and usages of the church or denomination to which said corporation shall belong, and making it unlawful to divert such estate, property, or revenue, to any purpose except the support and maintenance of such church, or religious or benevolent institution or object connected with the church or denomination, to which such corporation shall belong.[1] As indicated by the corporate title and admitted by the pleadings, defendant was a religious corporation duly organized under the laws of New York, and the question for decision presented to the court was whether, under the laws of that state, the plaintiff could maintain an action to recover damages for injuries sustained by reason of the negligence of an employee of the defendant, there being no allegation that such employee was not qualified for the work he was engaged to perform, or that there had been any negligence on the part of the officers of the corporation in his selection. The court observed that there was no allegation in the pleadings that the corporation was possessed of any other funds except those for the support and maintenance of the charity. "It has no capital stock, no financial return is made to its members, and, as far as appears, its officers serve without compensation. Under such circumstances it is merely an instrument of law to accomplish a certain object. The donor of its funds have selected it as a trustee for this object, and the estate, property and revenue in its hands are impressed with the trust for that purpose, and it does not seem to me to be lawful to divert them to any other, and consequently none of these funds can be diverted to the payment of damages for a personal injury received by a stranger at the hands of an agent not shown to be unworthy or unfit for the purpose for

* An article by this writer on "Torts of Charitable Institutions Maintained by Taxation" appeared in the CENTRAL LAW JOURNAL of July 26, 1901.

[1] Chapter 176, Laws 1876, sec. 1. A similar statute exists in Illinois, §§ 42 and 43, ch. 32; Corporations, 1 Starr & Curtis' An. St. p. 623.

which he was employed."[2] "It is true," the court further remarked, "that most of the adjudged cases are those in which hospitals or other charities of that character were sought to be subjected to liability. But all of them proceeded upon the ground that it would be a diversion of the trust funds if they could be compelled to pay damages out of them, *and in this respect we think that religious corporations are upon the same footing with hospitals, or other charitable institutions.* The objects of the association are certainly as worthy and the trusts as sacred as in any other class of cases, and their liability in such actions as this must be denied." But on the other hand where it appeared that the plaintiff, while attending a church conference was injured without her fault, by falling over a dangerous wall which defendant congregation had constructed on the premises, it was held in Massachusetts that the jury were justified in finding that defendant was guilty of a breach of duty to keep its premises safe for plaintiff and others coming thereon by its invitation. The application of the rules on which defendant's liability depends is not affected by the consideration that this is a religious society and that plaintiff came there solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that plaintiff came by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that, too, although the defendant in giving the invitation was actuated only by motives of friendship and Christian charity.[3] And so a corporation, although much of its work is of a religious and charitable nature, but whose purposes are also social and include the giving of lectures and theatrical and other entertainments for the benefit of its members, the provision of a gymnasium and of athletic sports for promoting the health, and also engaging in the sale of food at a coffee or lunch counter, is not within the exemption which protects public charitable corporations from liability for neligence,[4] in allowing its floor to remain in a defective condition whereby one coming on its premises by invitation was seriously injured, although its general objects are of such a nature as to endow it with legal capacity to take a charitable gift.[5] And the fact that the funds of a cemetary association were actually applied to a considerable extent, in charity, is no more material, in Massachusetts, to relieve a mere religious society from liability, than evidence of a similar application of a part of his income by a private citizen would be in a suit against him.[6]

The Sisters of Charity.—Inasmuch as hospitals and asylums under the control of the religious orders aid to lighten public burdens by relieving the community from the necessity for resorting to taxation to establish and maintain such institutions, justice and sound policy would seem to require that they be extended the same privileges and immunities that would be claimed by the state should it undertake similar enterprises. Therefore, although the facts showed the admission of plaintiff to the "private pay patients' department" of a public charitable hospital conducted by the sisters of charity, under an express contract that she should have a private room and medicines and should be constantly attended by a skillful, experienced and trained nurse, and that the very best of care should be taken of her, for which she agreed to pay, and did pay, the hospital $25 per week and the nurse so furnished to be paid $3 per day additional, but a nurse was furnished who had only been on probation for a course of instruction for a short period of time, and in disregard of the order of her superior, through forgetfulness or gross carelessness, left an uncovered hot water bag in the bed in which plaintiff was to be placed while under the influence of an anaesthetic after an operation, and from

[2] Haas v. Missionary Society of the Most Holy Redeemer, 6 Misc. Rep. 281, 26 N. Y. Supp. 868.

[3] Davis v. Central Congregational Church of Jamaica Plains (Mass.), 34 Am. Rep. 233.

[4] Chapin v. Holyoke Young Men's Christian Assn., 165 Mass. 280, 42 N. E. Rep. 1130.

[5] Goodell v. Young Men's Christian Assn., 29 N. J. Eq. 32.

[6] Donnelly v. Boston Catholic Cemetery Assn., 146 Mass. 163, 15 N. E. Rep. 505, 5 New Eng. Rep. 741. A city owning a cemetery, in a vault erected upon which an employee is injured, owing to the negligence of the superintendent of the cemetery whose orders and directions the employee was bound to obey, was held liable for such injuries, on the ground that the cemetery and vault were a source of benefit and advantage to the corporation, and involved the same responsibility for their unsafe and improper management which pecuniary and proprietary interests entail upon natural persons. City of Toledo v. Cone, 41 Ohio St. 149.

contact with such hot water bag plaintiff's right leg was so severely burned as to result in an open wound requiring a surgical operation before it would heal, and even after the recovery of the wound proved to be considerably impaired, the court held that a public charitable hospital is not liable even to a pay patient therein through the negligence of a nurse employed in the hospital where there was no negligence in the orginal selection of the nurse. It was also held that the rule of public policy was too firmly established by judical decisions to admit of its disturbance, although no doubt it would be wise to hold even charitable institutions to a higher degree of care. That this immunity is founded on public policy upon which also the very doctrine of *respondeat superior* rests, and should be extended to pay patients on authority of the line of cases holding that the exaction of compensation does not devest the institution of its charitable character. The principle of non-liability in cases wherein it appears that due care was used in the selection of employees and servants, to select only such as were competent and trustworthy, was still further qualified in this decision by the observation that in such selection it is doubtful if the obligation or duty of the hospital extends beyond the employment of competent heads of departments.[7] A corporation organized solely for the purpose of a charity hospital, having no capital stock and declaring no dividends and using its income derived from voluntary contributions, except in certain cases where reasonable amount is charged for board, room and nursing, to those who are able to pay, in the management of the hospital, is not liable for injuries to a pay patient through the negligence of a nurse, where it does not appear that the corporation was negligent in the selection of its servants.[8] The rule is that the receipt of compensation from those who enjoy the comforts of a hospital, library or institution of like character does not affect its charitable nature, provided its objects and purposes are wholly charitable and it contains no element of private gain.[9] But on the contrary such institution is still entitled to all the exemptions extended by the law whether such exemptions be from taxation,[10] or from negligence of its agents or servants resulting in personal injuries.[11] In Connecticut an institution for the deaf and dumb,[12] in Maryland a college,[13] and in Massachusetts an asylum for aged women,[14] were each held not to be devested of their charitable natures by the mere receipt of fees from the beneficiaries, it appearing that there was no pecuniary profit accruing therefrom, and that their essential characteristic was benevolence. The defendant is not liable except for omission to use due care in the selection of its skilled employees, surgeons, and others, even though the injuries complained of occur in consequence of the breach of an express contract.[15]

Privately Endowed Charity Hospitals.—It has been observed above that individual and collective private philanthropy and benevolence are encouraged by the extension to such institutions as are founded thereby, of like exemptions and immunities as are accorded to those founded by individual and collective piety, and upon the like ground that the funds of the institution are impressed with a trust for the purposes contemplated by the donors and cannot be lawfully diverted to any other. In the pioneer case in which liability was denied, the Massachusetts General Hospital was sued for negligent and unskillful treatment of a broken leg, resulting in permanent injuries to the plaintiff, one of the charity patients of the hospital. It appeared that defendant was incorporated by statute, its funds being derived from grants and donations made by the commonwealth from the profits which it was entitled to receive from the Massachusetts Hospital Life Insurance Co., and from other companies doing business in Massachusetts, paid over to it, although no mention is made of any participation in the

[7] Ward v. St. Vincent's Hospital, 50 N. Y. Supp. 466. And see Joel v. Women's Hospital, 35 N. Y. Supp. 37, identical in the facts, and a like result was reached, and similar opinions expressed.

[8] Connors v. Sisters of the Poor of St. Francis, 10 Ohio S. & C. P. Dec. 86.

[9] Donahue's Appeal, 86 Pa. St. 312.

[10] New York Hospital v. Purdy, 12 N. Y. Supp. 307.

[11] Ward v. St. Vincent's Hospital, 50 N. Y. Supp. 466.

[12] American Asylum v. Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112.

[13] Regents of the University of Maryland v. Williams, 9 Gill & J. 365.

[14] Gooch v. Associantion for Relief of Aged Females, 109 Mass. 558.

[15] Van Tassell v. Manhattan Eye & Ear Hospital, 15 N. Y. Supp. 620; Joel v. Woman's Hospital, 35 N. Y. Supp. 37, 89 Hun, 75.

control thereof by the state authorities, and from the grants, donations, bequests and subscriptions of benevolent persons, and from the board of paying patients; its objects being the maintenance of a general hospital for the sick and insane. The plaintiff was cared for and nursed, as a charity extended to him occupying one of the free beds established in the hospital. It also appeared that the corporation had no capital stock and yielded no dividends or profits but held its funds and receipts in trust for the exclusive purpose mentioned in its charter. Liability was denied on the ground that the hospital was a public, charitable institution under the laws of the commonwealth, and that the fact that the trustees through their agents are authorized to determine who are to be the immediate objects of the charity and that no person individually had a right to its benefits did not alter its character. "It might well be questioned," said the court, "whether any contract between plaintiff and defendant could be inferred from plaintiff's admission into the hospital. It has offered him those ministrations which as the dispenser of a public charity it has been able to provide for his comfort, and he has accepted them.[16] The foregoing views acquire additional strength from their reiteration by the federal court in Powers v. Massachusetts Homeopathic Hospital, where it was said that the "person who enters a charitable hospital is not a contractor, neither is the hospital a contractor with that person. The person who enters is a mere licensee who must take the service as he finds it. Pollock on Torts (4th Ed.), p. 473, lays down the law that 'invitation is a word applied in common speech to the relation of host and guest. But a guest, that is, a visitor who does not pay for his entertainment, has not the benefit of the legal doctrine of invitation in the sense now before us. He is in point of law nothing but a licensee. The reason given is that he cannot have higher rights than a member of the household of which he has for the time being become a member or a part. All he is entitled to is not to be led into a danger known to his host and not known by or reasonably apparent to himself.' This is the precise rule which applies to a public charity and in this respect a private charity rests upon exactly the same grounds and there is no basis in either to hold that the person who receives bounty is a contractor —a person contracting for services, as one of us engages services when we ordinarly employ a physician."[17]

If, however, there can be any contract inferred from the relation of the parties it can only be on the part of the corporation that it shall use due and reasonable care in the selection of its agents.[18] And where a charitable incorporation created by the legislature for the purpose of treating indigent persons, suffering from diseases of the eye and ear, was sought to be subjected to liability for injuries resulting to a patient from the alleged unskillful performance of an operation, but it appeared that due care had been used in the selection of the agents and servants of the institution, including the surgeon in question, it was held that such liability must be denied.[19] There can be no charge of negligence unless there is a breach of some duty imposed by law, and to ascertain whether there was negligence on the part of the hospital authorities in their care of one claiming to have sustained injuries from such alleged negligence, the duty which the law imposes on them must be considered. * * * In Harris v. Woman's Hospital,[20] the court said that the plaintiff's contention that the hospital should be liable for the actual negligence of its physicians and nurse without regard to the fact that it had exercised due care in their selection was questionable, for upon the authorities in regard to the liability of a corporation for the acts of its servants a distinction is made with reference to charity hospitals, it having been held with good reason that they are not liable for injuries to a patient caused by the injurious acts of their agents where it is shown that they have exercised due care in the selection of such agents. The corporation is not liable for the malpractice of a surgeon or assistant

[16] McDonald v. Massachusetts General Hospital, 120 Mass. 432 21 Am. Rep. 529.

[17] Powers v. Massachusetts Homeopathic Hospital, 101 Fed. Rep. 896, 51 Cent. L. J. 280.

[18] McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529.

[19] Van Tassell v. Manhattan Eye & Ear Hospital, 15 N. Y. Supp. 620, 39 N. Y. St. Rep. 781.

[20] 14 N. Y. Supp. 881, citing Pryor v. Hospital, 4 N. Y. L. J. 450. And see Proctor v. Manhattan Eye & Ear Hospital, 15 Med. Rec. 25.

in charge of the patient,[21] or even for injuries resulting from unsafe and dangerous premises. Such is the practical result of a decision denying a cause of action predicated upon the insecure and insufficient construction of the rooms provided for the custody of plaintiff's intestate, an insane person, whereby he was killed while attempting to get out. Payment of an agreed compensation to the institution for decedent's care and treatment, and the breach of the undertaking of the institution to safely keep him, were all held insufficient to create liability. The defendant institution is a type of many that have sprung up in recent years under private philanthropy, encouraged by enabling legislation, and we may therefore profitably study its description which is given in the opinion of the court, as follows: "The defendant was organized under a statute providing for the incorporation of hospitals or asylums in cases where valuable grants or emoluments have been made to trustees for such purposes, and at the time was maintaining the institution known as Harper Hospital. The organization had its origin in two deeds conveying lands in trust for the founding and maintenance of an hospital in the city of Detroit, for the succor, care and relief of such aged, sick and poor persons who shall apply for the benefit of the same, and who shall seem to any trustee thereof to be proper subjects of such aid as their means will enable them to afford. The particulars of the scheme for founding the hospital and all the details were left to be devised and controlled by the trustees. The trust was accepted by the trustees, and under the laws above referred to the trustees conveyed the property to the defendant corporation, the deed providing that if the legislature should enact a law enabling a corporation to be formed for the purpose named in them, the trustees might convey all the lands and funds to the corporation formed therefor. The corporation receives no compensation and pays no dividens. It is purely an eleemosynary institution, organized and maintained, not for private gain, but for the purpose of giving proper care and medical treatment to the sick. The law under which the defendant is organized recognizes it as a charity, exempts its property from taxation, provides that its funds shall be used faithfully and exclusively for the purpose of its organization. If plaintiff's contention be true, it follows that the charity or trust fund must be used to compensate injured parties for the negligence of the trustees, or architects or builders upon whose judgment reliance was placed as to plans and strength of materials; and also of physicians employed to treat patients, and even for the negligence of nurses and attendants. In this way the trust fund might be entirely destroyed and diverted from the purpose for which the donor gave it. Charitable bequests cannot be thus thwarted for negligence for which the donor is in no manner responsible. If, in the proper execution of the trust, a trustee or an employe commits an act of negligence, he may be held responsible for the negligent act, but the law jealously guards the charitable fund and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the manager of the fund or their employee though such act result in damages to an innocent beneficiary. Those who voluntarily accept the benefit of the charity accept it on this condition. The fact that patients who are able to pay are required to do so, does not deprive the defendant of its eleemosynary character nor permit a recovery for damages on account of the existence of contractual relations. The amounts thus received are not for private gain but contribute to the more effectual accomplishment of the purpose for which the charity was founded. The wrongdoer in a case of injury—but not the trust fund—must respond in damages.[22] The authorities are in fact in perfect accord that a corporation incurs no liability and parts with no exemption with respect to its character as a charity, by reason of requiring payment, and that the frequent reception of money from any particular patient does not change the nature of the service rendered that patient. What-

[21] Eiblee v. Long Island College Hospital, an unreported case cited in 15 N. Y. Supp. 620.

[22] Downs, Admr., v. Harper Hospital, 101 Mich. 555, 60 N. W. Rep. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427.

ever is received is as a proper contribution to a charity on the part of the person who makes the payment. It is not received as compensation. It is not compensation in the sense of the law.[23] Again, a corporation conducting a home for the support of aged women, which devotes all its funds to the support of such women in its home, and is no source of profit to its members, is a charitable corporation, although it requires a payment of money as a requisite for admitting a woman to its home. The fact that its funds are supplemented by such amount as it may receive from those who are able to pay wholly or partially for the accommodation that they may receive, does not render it any the less a public charity. All sums thus received are held upon the same trust as are the gifts of pure benevolence.[24]

An Exception to the Rule of Respondeat Superior.—The drift of the foregoing cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant and not caused by its own corporate negligence or the failure to perform a duty impressed on it by law. This general conviction rests on sound legal principles, and is strengthened by an able and exhaustive review of all the American, English, and colonial decisions, in a recent Connecticut opinion in which, in support of what may now be appropriately designated, the "American" doctrine. The court said, in part, that "the law which makes one responsible for an act not his own because the actual wrongdoer is his servant, is based on public policy. The liability of a charitable corporation for the defaults of its servants must depend on the reasons of that rule of policy and their application to such a corporation. This rule of public policy modified the development of the law of master and servant from the beginning, and in this way infused into the law of agency a sort of fictitious agency depending, not on the principle of justice that makes one responsible for his own act, but on a rule of public policy which, under certain circumstances, estops one from showing that the act in question was not his own. The reasons for the rule have been differently stated by others. In Maximillian v. Mayor of New York,[25] the rule is based on the right which the employer has to select his servants, to discharge them if not competent, and to control them while in his employ. Wharton on Negligence, p. 9157, gives the reason of the policy that he who puts in operation an agency which he controls while he receives its emoluments, is responsible for the injuries it incidentally inflicts, relying on Lord Brougham's statement in Duncan v. Findlater, "I am liable for what is done for me and under my orders by the man I employ, for I may turn him from that employment when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it." Defendant does not come within the main reason of the rule of public policy which supports the doctrine of *respondeat superior*. It derives no benefit from what its servants do in the sense of that personal and private gain which was the real reason for the rule. Again, so far as persons injured are concerned, as patients of hospitals, defendant does not set the whole thing in motion in the sense in which that phrase is used as expressing a reason for the rule. Such patient injured by the wrongful act of the hospital servant is not a mere third party, a stranger to the transaction, he is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public. Surely those who accept the benefit assist as truly as the defendant in setting the whole thing in motion. But the practical ground upon which the rule is based is simply this; on the whole substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set at work by him to prosecute his private ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule

[23] Powers v. Homeopathic Hospital, 101 Fed. Rep. 896, 51 Cent. L. J. 280.

[24] Gooch v. Association, 109 Mass. 558. Note on Keeley Institute: The receipt of a royalty on each patient who is treated by a branch establishment does not render the parent institute liable for the negligence of individuals conducting such branch, resulting in death of a patient. Keeley Institute v. Dougherty, 28 S. E. Rep. 511.

[25] 62 N. Y. 168, 20 Am. Rep. 488.

but it rests on public policy too firmly settled to be questioned. We are now asked to apply this rule for the first time to a class of masters distinct from all others who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule and to declare a new public policy, and say that on the whole substantial justice is best served by making the owners of a public charity involving no private gain, responsible not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and benefit. We think the law does not justify such an extension of the rule of *respondeat superior*. It is perhaps immaterial whether we say that public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule, or say that public policy which encourages enterprises for charitable purposes requires exemption from the operation of a rule based on legal fiction, and which as applied to the owners of charitable enterprises is clearly opposed to substantial justice. It is enough that a charitable corporation like defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable on grounds of public policy for injuries caused by personal wrongful neglect of a servant in the performance of his duty by a servant who it has selected with due care, but in such case the servant alone is responsible for his own wrong.[26]

Contrary Conclusion Expressed in Rhode Island.—In an opinion containing an equally exhaustive review of the cases, the Rhode Island court reached a contrary conclusion. The greater part of the opinion was devoted to an effort to show that the recent English cases have abandoned the reasoning of former decisions, on which was based, principally, the theory of liability worked out in McDonald v. Massachusetts General Hospital, *supra*, and that therefore such theory is no longer entitled to the respect formerly given it in this class of cases. The position was taken, that although a hospital is adminstered as a charity, and its income derived mainly from its endowments and from voluntary contributions, and the physicians and surgeons attendant thereon and the medical and surgical internes, gave their services without compensation, except that the internes, who were required to be in attendance day and night had their board and lodging in the hospital, and patients who were able to pay were required to pay nothing beyond a reasonable amount to cover board, washing, warmth and the services of nurses and wardtenders, and an action for damages against such hospital for injuries caused by the negligence of an unskillful interne therefore within the doctrine of McDonald v. Massachusetts General Hospital that a corporation, or *quasi*-corporation, board or body, having a public trust or duty to discharge gratuitously is not liable for the torts of its servants or employees, if it is personally without fault, yet the authority of that case so far as it rests on the earlier English decisions is so seriously impaired by the more recent expressions of the English courts, that the question arises whether it might not have been better decided on the other grounds suggested in the opinion of the court. The other grounds suggested were two. The first was that the corporation could not be presumed to have agreed to do more than furnish hospital accommodation and these the plaintiff has had, and its liability does not therefore extend beyond the exercise of reasonable care to get such physicians or surgeons as are skillful and trustworthy in their profession. In the case at bar, however, said the court, "the injury was not received from a physician or surgeon but from a surgical interne, and an interne stands on a different footing. It is the duty of the interne, acting on behalf of the hospital, to send for physicians and surgeons promptly in emergencies, and a rule of the hospital prescribes that in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring immediate operations, the interne shall send for the surgeon of the day, and if he cannot be found for one of the other surgeons. Here, then, we have the relation of principal and agent or master and servant. If the interne neglects to call the surgeon in the class of cases designated, his neglect is the neglect of the corporation. Now, the plaintiff contends that his injury was such that under the rule a surgeon should have been sent for immediately and that the interne's neglect to

[26] Hearns v. Waterbury Hospital, 33 Atl. Rep. 95.

do so cost him his arm. And further, that the corporation did not use proper care in selecting the interne, who was incompetent for his position, and thereby he suffered the injury he complained of. He contends that he was entitled to recover on both these grounds, and if the evidence was sufficient to establish them, we think that he was entitled to recover on both grounds unless the hospital enjoys some peculiar immunity. This brings us to the important question whether the hospital does enjoy any peculiar exemption from liability. The claim that it enjoys such an exemption rests upon two grounds, to-wit, on the ground of public policy and on the ground that the hospital has no funds except such as are exclusively dedicated to the charitable uses for which it was established, and which therefore cannot be applied to indemnify a patient who has been injured by the negligence or malpractice of a physician or surgeon or of a medical or surgical interne. The first is based on the argument that hospitals like the Rhode Island Hospital are public benefits, but that if they are liable for the torts of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, people will be discouraged from voluntarily contributing to their foundation and support, and therefore public policy demands that they should be exempted from liability. In our opinion the argument will not bear examination. The public is doubtless interested in the maintenance of a great public charity such as the Rhode Island Hospital is; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent therefore it has an interest against exempting any such person and any such corporation from liability for its negligence. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court but for the legislature. The second ground is one of the grounds suggested in McDonald v. Hospital, *supra*. The line of earlier English cases on which this decision is based have no value as precedents in any case where there are funds or income which can be applied to the payment of damages, the more modern English decisions uniformly regarding them as overruled. In view of these later decisions the question here is whether a charitable corporation like the defendant which holds its property for the charity, and because it holds its property for the charity, is relieved from all responsibility for the torts or negligence of its officers, trustees, agents or servants. We have come to the conclusion after much consideration that it is not. We understand the doctrine of the recent English cases to be this, that where there is a duty there is, *prima facie* at least, liability for its neglect; and that where a corporation is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation to exercise such care and skill, and the fact that it acts gratuitously and has no property of its own in which it is beneficially interested will not exempt it from liability for any neglect of duty if it has funds, or the capacity of acquiring funds, for the purposes of its creation which can be applied to the satisfaction of any judgment for damages recovered against it. We also understand that the doctrine is that the corporate funds can be applied notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them. We do not understand, however, that the corporate property is all equally applicable. It may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it cannot be diverted to the payment of damages. But, however that may be, we understand that the defendant corporation is in the receipt of funds which are applicable generally to the uses of the hospital, and we think a judgment in tort for damages against the corporation can be paid out of them."[27] And it was therefore held that the court below erred in directing a verdict for defendant on the ground that said institution was 'the dispenser of a public charity and dependent for support on voluntary contributions, and consequently for reasons of public policy, exempted from liability for any negligence or unskillfulness of its agents, servants, physicians, surgeons and internes.

[27] Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

The result reached in this case met with such dissent from the public that at the earliest session of the legislature thereafter the doctrine of McDonald v. Hospital, *supra*, was in effect incorporated into the settled jurisprudence of the state by statute.[28]

WM. B. MORRIS.

[28] Laws, Rhode Island, 1880, ch. 162, § 1. "No hospital incorporated by the general assembly of this state, sustained in whole or in part by charitable contributions or endowments, shall be liable for the neglect, carelessness, want of skill, or for the malicious acts of any of its officers, agents or employees in the management of, or in the care or treatment of, any of the patients or inmates of such hospital, but nothing herein contained shall be so construed as to impair any remedy under existing laws which any person may have against any officer, agent or employee of any such hospital for any wrongful act or omission in the course of his official conduct or employment."

TELEPHONE COMPANIES — ERECTION OF POLES AND WIRES—SUBSURFACE CONDUITS.

NORTHWESTERN TEL. EX. CO. v. CITY OF MINNEAPOLIS.

Supreme Court of Minnesota, May 10, 1901.

1. Held, that under the general laws of this state (section 28, ch. 34, Gen. St. 1866), as amended by chapter 73, Gen. Laws 1881, (section 2641, Gen. St. 1894), telephone companies are given the right to erect poles and wires within the urban ways and streets of this state as well as upon rural highways.

2. That the provisions of the charter of Minneapolis confer upon that city no authority to arbitrarily order a removal of such poles and wires, but only the right to regulate the placing of the same in its streets, and to compel the telephone companies to put their wires in subsurface conduits when reason, convenience, or the good government of the municipality requires.

LOVELY, J.: The public importance of our previous decision upon the control by the municipalities of this state of their streets in the use of the same by telephone companies, as well as the fact that full consideration was not given in the original opinion to the subject of legislative authority for such control, nor to the dependent rights of the telephone companies thereunder, has required a reinvestigation of the whole subject upon reargument. We recognize that important questions other than those actually referred to in the opinion are material to the disposition of the order of the trial court, and have regarded it as our duty to reconsider so much of the subject involved, determinative of this appeal, but not referred to in the opinion, which we think may be embraced comprehensively in the following propositions: (1) Did the telephone company have any right from the State to erect its poles and wires in defendant's streets? If so, what was the nature and extent of such right? (2) Did the city possess a delegated power to control, limit, regulate, or restrict the placing of poles and wires by plaintiff in its streets? And, if so, what were the limitations of such right?

1. What were plaintiff's rights under the general laws of this state? It was claimed that we had overlooked the fact in the previous opinion that under the decisions of this court the city of Minneapolis had no power to make the contract with the telephone company, for the reason that such power must necessarily be derived from the State, where it originally belonged, as an element of its sovereignty, and that the State had never delegated such power to the city, from which conclusion it would necessarily follow that the contract between the city and the company was in excess of authority. The decisions invoked to support this position undoubtedly sustain the view that the plaintiff must necessarily rest its authority upon a prior grant of power from the state. Nash v. Lowry, 37 Minn. 261, 33 N. W. Rep. 787; City of St. Paul v. Chicago, M. & St. P. Ry. Co., 63 Minn. 330, 63 N. W. Rep. 267, 65 N. W. Rep. 267, 649, 68 N. W. Rep. 458, 34 L. R. A. 184. It is not to be questioned that this original element of state control over its public thoroughfares might be legally delegated to municipalities, even to the power of excluding poles and wires entirely from urban streets. In such case the streets cannot be used except by permission of the city, who can restrain such use without reference to public benefits or advantage; and this conclusion presents the necessity of referring to the general legislation of the state, where authority to use such thoroughfares for poles and wires must be found, if it exists.

In 1860 the following statutory provision applicable to telegraph companies was enacted: "Any telegraph company incorporated or organized under the laws of this state, shall have full power and right to use the public roads and highways of this state, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or other fixtures: provided, however, that the same shall be located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads or highways." This section was incorporated into the revision of 1866, where it continued without change until 1881, when this statute was amended by inserting after the word "telegraph" the words, "or telephone." Chapter 73, Gen. Laws 1881. Section 2641, Gen. St. 1894. In passing, it may be well to say that this court has never recognized any difference in character between telephone and telegraph companies. For the purpose of construing the effect of the legislative enactment referred to, no distinction can be made in favor of telegraph over telephone companies, in their imposition of burdens upon the public thoroughfares of this state.

It is contended by defendant that the legislature

did not intend to include the streets of a city in the term "road and highways," in the enactment of the amended statute of 1881, which gives the same right to telephone as to the telegraph companies, but that a distinction was intended, and must be now applied, in construing this statute, as between urban and rural highways, limiting such use solely to country roads. The definition of a word in a statute need not be absolutely decisive of its meaning in all cases. The history of the act, its general purpose, the mischief to be cured or benefits to be obtained, according to general understanding, as well as the sense to be derived from its connection in the same or other statutes, may be essential to aid courts in the duty of construction. The approved legal definition of "highway" is "a passage or road through the country, or some parts of it, for the use of the people. It is the generic name for all kinds of public ways." Bouv. Law Dict., "Highways." We might collect authorities without number to show that this term has been applied in judicial decisions, in its generic sense, to city streets. The result of such investigation leads to the conclusion, seemingly too plain for serious discussion, that the word "highway," in actual use, embraces city streets as well as country roads, furnishing the strongest inference that it was intended to apply to both, and that while the word "street" is more often used than "highway" to designate an urban way, yet it was in this statute used for both purposes.

The suggestion that the proviso limiting the erection of posts or poles so that the same shall "in no way interfere with the safety or conveyance of ordinary travel on or over said roads or highways" is more applicable to rural than urban streets is of little significance, or that such restriction is ordinarily a subject of municipal control under charter provisions has no persuasive force in construing into this law the distinction urged. Ordinary travel takes place on city streets as well as rural roads, and the proviso would go on further than to secure the protection when needed.

If we recur to the historical facts which assist in defining the meaning of this law, we find that, so far as the placing of poles and wires on highways is concerned, that right was created by legislative action more than 40 years ago, and it has continued in force and materially aided in the growth of this great commonwealth; and the only change of such right, until 1893, has been an extension of its benefits. For twenty years the telegraph companies of this state applied its terms comprehensively to cover their necessities upon all public ways, both ural and urban, when the telephone companies were given the same benefit. For 10 years thereafter, at least, the telegraph companies exercised the same privileges as before, while the telephone companies during the intermediate period between the amendment and the origin of the long-distance service derived no other benefits than within the urban districts to which they confined their business, and to which it is now claimed the statute did not refer. In other words, the telephone companies were using, under the benefits of this statute, without apparent objection, the places where it did not, on defendant's theory, apply, and did not use the only places where it did apply, while the telegraph companies were using both for the same purpose; and the inference that follows is obvious, and lies upon the surface. The people understood the law to mean what it said, and had found it sufficient to meet the necessities of the people of this state, and consonant with the demands of growth and progress, and for thirty years and more its benefits as to both kinds of companies were accepted, and it was not amended or changed.

The strongest argument in support of defendants' contention that there was a reserved legislative purpose to exclude urban thoroughfares from the benefits of the statutes is that such a restriction has been practically placed upon the statute by the plaintiff itself. It is urged that plaintiff and others similarly situated have repeatedly sought concessions from municipalities, particularly from defendants, at variance with the right to use their streets, which it now insists upon; that the privilege of placing poles and wires in the streets has never until the present time been demanded as a right, but has been accepted (as under the ordinance of 1883, set forth at length in the former opinion), and the fact that the plaintiff has recognized the power of the city to control this subject is to be given weight; and this, to a certain extent, is true, although to what extent, and how far such privileges have been asked for and received, in the absence of any reliable *data*, it is not easy to determine. There is some logical force in this claim, although it cannot be deemed controlling, nor sufficient to overcome the spirit of the statute expressed in its literal terms; for it is in opposition to the source of the real authority to construe the law, which is judicial, and vested in the courts. If the meaning of the words of the statute were doubtful, the interpretation which the telephone company and the city have placed upon its meaning might be more weighty; but where there is no doubt, or private policy and self-interest dictate the action of either party, such arguments is of very little force. Were it clear that no such authority to use urban ways had been vested in the telephone company by the general statute, its assertion or assumption of such right would not create it, or, if a reasonable construction would not permit such a view, the plaintiff could not determine the question by its own acts. It would still be for the courts, rather than the plaintiff, to construe the meaning of the law.

We have not overlooked two recent enactments affecting the subject. In 1893, for the first time, a restrictive proviso was incorporated into an amended section of title 1, § 1, ch. 34, Gen. St. 1878 (title 1, § 2592, ch. 34, Gen. St. 1894),

providing for the organization of corporations, to the effect that no franchise should be granted to telegraph or telephone companies that would authorize them to place their poles and wires in city streets without permission of the municipality. Gen. Laws 1893, ch. 74. And to the same effect is Gen. Laws 1899, ch. 51. The plaintiff was organized as a corporation in 1878. It obtained the benefits of the act of 1860, above referred to, in 1881, which became a contract between the state and the plaintiff by the acceptance of the same. Hence the proviso in the law of 1893 and 1899, being prospective, could not impair rights that had become vested, because forbidden under the clearest prohibitions in the state and federal constitutions; and it is not claimed that these statutes did so, nor is it possible to treat the latter proviso as a legislative interpretation of the original act of 1860, which had been continued in force up to that time, without change, unless the inference follows, for what it is worth, that these restrictive provisions were enacted to impose upon companies organized in the future an obligation which was by the legislature not supposed to be expressed in any previous statute. This inference favors plaintiff's contention.

As a result of this review of the subject, we are led to the conclusion that the plaintiff had a right to use the streets of the city, under proper regulations and restrictions (referred to in the original appeal) by the municipality. What such power of regulation in the city imposed in its relation to the plaintiff is still to be considered. Since the first argument in this case the general statute (section 2641, Gen. St. 1894) has been judicially construed by the United States Circuit Court of this district, and the conclusions expressed above find authority therein, as well as the necessary deduction that any ordinance of the city interfering with or impairing the vested right thus conferred upon the plaintiff by the state violated constitutional rights and was invalid. Abbott v. City of Duluth (C. C.), 104 Fed. Rep. 833.

2. It still remains to consider such provisions of the city charter as affect the subject under the inquiry. Did the city possess a delegated power to limit and regulate the placing of poles and wires by plaintiff in its streets; and, if so, what were the limits upon such right? The provisions of the defendant's charter germane to this subject at the time when the ordinance of 1883 was enacted by the common council in the exercise of the delegation of power to defendant over its streets gave it the right, under subdivision 6, § 5, ch. 4, "to prevent the incumbering of streets, alleys, lanes, sidewalks, public grounds, or wharves with carriages, carts, wagons, sleighs, boxes, lumber, firewood, posts, awnings or any other materials or substance whatever;" and by subdivision 31, § 5, ch. 4, the power "to remove and abate any nuisance, obstruction or encroachment upon the streets, alleys, public grounds and highways of the city;" and by section 1, ch. 8, "the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city." Such was the power delegated to the city council to adopt the ordinance of 1883, set forth at length in the opinion, which conferred upon the plaintiff the right to use and occupy the streets and alleys of the city with its poles and wires. Nothing in the provisions above quoted conflicts with the power to pass such ordinance. On the other hand, under such general provisions, even in the absence of the general statute (section 2641, Gen. St. 1894), it might be held that sufficient power was so delegated for that purpose. In a recent case decided by the United States Circuit Court of Appeals for this circuit, it was held (Sanborn, J.), under a statute where the city of Colorado Springs was empowered to regulate the use of its streets, to provide for the lighting of the same, and to pass all ordinances and to make all rules and regulations demanded or necessary to exercise those powers, that "it had the implied authority to grant the right and privilege to construct a power house to generate electricity on its public grounds," etc. Pikes Peak Power Co. v. City of Colorado Springs (C. C. A.) 105 Fed. Rep. 1. Thirty-four days after the passage of the ordinance under which the city attempted to grant the right to the telephone company to erect its poles in its streets, the charter of the city was amended by adding to section 5, ch. 4, the following authority to be exercised by the council: "To regulate and control or prohibit the placing of poles and the suspending of electric and other wires along or across the streets of said city, and to require any or all already placed or suspended either in limited districts, or throughout the entire city, to be removed or to be placed in such manner as it may designate beneath the surface of the street or sidewalk." This provision does not declare that the power therein conferred is exclusive in the city, nor that the right to remove poles and wires in the streets is to be exercised by the city arbitrarily. If the general statute (section 2641, Gen. St. 1894) is controlling, as we have held above, this provision should be construed so as to harmonize with that statute, and not given such a construction as would give absolute power to the city to remove wires and poles without reason or necessity, for such a view would clearly interfere with plaintiff's vested rights; or if, as we are lead to believe, there was authority under the previous provisions of the charter in force at the time the ordinance of 1883 was enacted and accepted by the plaintiff, it follows, as held in Pikes Peak Power Co. v. City of Colorado Springs, *supra*, that an ordinance of a city passed under legislative authority, witbin the provision of the federal constitution, "cannot be repealed by later ordinances which would be so clearly a violation of section 10, art. 1, which prevents the passing

of a law impairing the obligations of a contract, and the fourteenth amendment to the constitution, which forbids the taking of property without due process of law," that, as held in that case, "no argument to the contrary would be worthy of a moment's consideration."

We think much misunderstanding has arisen from the previous opinion, through a failure to realize what was actually determined. We have not held, and do not hold, that the city had the power to confer upon the plaintiff vested rights to irrevocably occupy its streets, in violation of any reasonable right therein by the city. We hold that the only power delegated by the state to the city under any of the charter provisions referred to is the power of regulation, and the necessary control incident to such power. We held in the former opinion, and now hold, that the only contract entered into by the city with the defendant was with reference to the manner and method of placing its poles and wires. Such contract was within the police power of the city, and, the defendant having acted upon the contract by the ordinance of 1883 as to how it should place its poles and wires, the city cannot, without reasonable cause, in the exercise of its power of regulation, revoke its contract as to such matters, and order a different arrangement. The power of regulation, or the police power, as there designated, belonged to the state, and was delegated to the city in its charter; and we think that the charter provisions referred to fully recognize its beneficent authority, which should be exercised in reason and judgment for the best interest and welfare of the municipality, and secures all that is essential to a proper and reasonable control of the plaintiff's business. It is not to be assumed that the legislature, in delegating such powers, intended to violate the organic law, or (what would be, perhaps, as bad in its practical effect) to invest the defendant with the power to confer a monopoly in the use of its streets to a favored corporation, which is the logical and necessary result of defendant's claim. If the claims of the city are well founded upon the issue raised by the demurrer, it can grant a right to-day, and deprive the party to whom it is granted of such right to-morrow. If it can confer the privilege upon the plaintiff of placing overhead wires on the streets, and immediately thereafter compel the plaintiff to replace the same in subsurface conduits in rural neighborhoods, where there is no reason or necessity for such change, which purpose is admitted by the demurrer in this case, it might immediately thereafter compel the removal of the wires so placed in subsurface conduits. Nor is such a result impossible of conjecture. Oscillations of power in local government do not always vibrate from the same center, for history is full of illustrations to show that the guardians of the people may become their oppressors, through injurious monopolies that deprive the people of their privileges. The safeguards of the constitution are the ultimate refuge from such usurpations, and it cannot be believed, when we consider the extreme and justifiable jealously which has existed on the part of the lawmakers to guard against the abuse of power, that they could have intended to confer by doubtful terms an arbitrary right upon any municipality in this state unreasonably to deprive its citizens of the benefits of progress or to grant monopolies.

We have noted the point that the defendant claims that injunction is not the proper remedy; that it was the prerequisite duty of the plaintiff to have applied for permission to place its poles to the city engineer, and, on his refusal, to seek its rights through *mandamus*. This is not a case where ministerial officers have refused to perform a duty imposed upon them by law, but where the city itself, by the enactment of ordinances, prohibits it officers from performing such duties. In such a case injunction is clearly the proper remedy. What we have stated above, in addition to what is held in the original opinion, must be deemed a disposition of the claim that section 5 of the ordinance of 1883 gave the city the arbitrary power to remove poles at its pleasure, and we adhere to our former conclusions in this respect.

While we have not noticed particularly all the points suggested by counsel on the reargument and briefs, they have all been fully considered, and we have covered the propositions which seem to us to be decisive; and have reached the conclusion—which seem to us clear as can be realized in any disputed legal controversy—that the power to place poles and wires in the streets of municipalities in this state has been conferred upon the plaintiff by the legislature; that the question as to the manner in which this power should be exercised to meet the demands of convenience and necessity was within the authority of the city; that the ordinance of 1883 was, to a certain extent, so far as manner and form, at least, are concerned, the subject of contract obligation; and that the subsequent ordinances of May and October, 1899, as alleged in the plaintiff's complaint and admitted by the demurrer, impose such burdens upon the plaintiff as to impair their legal contract rights, and to that extent must be restrained, leaving the question of fact yet to be determined, whenever raised in the proper manner, whether the provisions of those ordinances, or of any other that may be adopted, are within the limits of wholesome and proper municipal regulation. For the reasons stated above, we abide by the former opinion of this court, and the order sustaining the demurrer is overruled, and the case remanded.

START, C. J., dissenting: I cannot assent to the conclusion reached by the court upon several vital questions, in this case. It is not my purpose, however, to discuss them in detail, but to simply state my conclusions.

I dissent from so much of the decision that is to the effect that telephone companies are given, subject only to a proper exercise of the police power, the right, by Gen. St. 1866, ch. 34, § 28, as amended by Laws, 1881, ch. 73 (Gen. St. 1894, § 2641), to use the public streets of the municipalities of the state, without the permission of the corporate authorities, for the purpose of erecting and maintaining their posts and wires therein, provided such posts be located as in no way to interfere with the safety or convenience of ordinary travel in such streets. It seems unreasonable to conclude that the legislature intended by this statute to repeal, *pro tanto*, existing special laws giving to the municipalities of the state the control of their streets, and to control the perpetual right upon telegraph and telephone companies to enter upon any and all of the streets of such municipalities, without consent of the governing body thereof, and erect and maintain therein their poles and wires, subject to no control or limitation except such as is incidental to the exercise of the police power.

I am of the opinion that the plaintiff has no right to maintain its poles and wires in the streets of the defendant city by virtue of Gen. St. 1894, § 2641, but that its rights therein depend upon the charter provisions and ordinances of the city. The plaintiff, by virtue of the existing charter provisions of the city, on January 24, 1883; the city ordinance of that date, referred to in the record as "Ordinance A;" the amendment of the charter 34 days thereafter (Sp. Laws 1883, ch. 3, § 13); and by its acceptance of the ordinance,—acquired a qualified contract right to maintain its telephone exchange system in the streets of the city. The right, however, to have the poles and wires removed from the surface of the streets, and placed underground, whenever, in the opinion of the city council, public interest so required, was expressly reserved, as a part of the contract. This stipulation is something more than the mere right to regulate and control the streets of the city and the business of the plaintiff in the exercise of the police power. That right is inalienable, and need not be reserved. While the city council, by virtue of this provision of the contract, cannot confiscate the plaintiff's property, nor wholly exclude it from the streets of the city, yet it does commit the question as to when, and to what extent, public safety, convenience, and comfort require that the defendant's poles should be removed from the surface of the streets, and its wires placed underground, to the discretion, judgment, and decision of the city council. It is the arbitrator agreed upon to determine the question, between the city and the plaintiff, whether public interests at any particular time require that the wires be placed below the surface of the street; and its decision, when made, whether it be correct, wise or just, is conclusive, unless it has acted in the premises arbitrarily or dishonestly. When, as in this case, the city council passes an ordinance requiring the wires within a designated district to be placed in subsurface conduits, the ordinance, whether a proper exercise of the police power or not, is valid, and must be obeyed, unless the plaintiff can establish by satisfactory evidence that the city council did not enact the ordinance in the exercise of a fair discretion, but arbitrarily or dishonestly. The allegations of the complaint, liberally construed, are sufficient to bring the case within the rule stated, and upon this ground alone I concur in the conclusion of the court that the complaint states a cause of action.

NOTE.—*The Authority of Municipalities Over Telephone, Telegraph and Electric Companies in Ordering the Removal of Poles or Other Obstructions.*—A question very often litigated at the present time, and on which the authorities are not in unison, is the right of municipalities, under charter provisions giving them power to regulate the use of streets, etc., to compel telephone, telegraph and electric companies to bury their wires, and to prevent the further use of poles or other fixtures on the highway which were erected by these companies under general state authority. It must first be recognized that where a telephone company erects its line in a street by the consent of the state and city, and pays damages therefor, it is not a nuisance. Brown v. Southwestern Telegraph & Telephone Co. (Tex. Civ. App.), 44 S. W. Rep. 59. And it must also be further noticed, however, that a municipality cannot deprive itself, by contract or ordinance, of the right to exercise the police power delegated by the statute to license and regulate the use of it streets by telephone and telegraph companies. Borough of Norristown v. Telephone Co. (Pa. Com. Pl. 1898), 15 Montg. Co. Law Rep. 9.

With these two general principles in mind, let us examine the authorities on the right of a municipality to regulate the erection of poles, and to what extent this right can be exercised under the police power. In Kentucky it was held, under Const., sec. 163, providing that no telephone company shall be permitted to erect its poles along the streets of a city without the consent of the proper legislative body of the city being first obtained, but further providing that when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply, where a city council had, without legislative authority prior to the adoption of the present constitution, attempted to grant the right to erect telephone poles and wires along and over the streets of the city, the city has the right to compel the removal of such poles and wires erected without the consent of the city council after the adoption of the constitution. East Tenn. Telephone Co. v. City of Russellville, 51 S. W. Rep. 308. In Wisconsin, Rev. Stat. 1898, sec. 1778, authorizes telephone companies to locate poles and wires in public streets. A city charter authorized the city council by ordinance or resolution to keep streets free from incumbrances and to regulate their use, and provided that no obstruction should be placed in streets without a written permit from the board of public works, which was given power to regulate the placing of telephone lines in streets, parties aggrieved by a decision of the board having the right to appeal to the city council. Held, that a telephone company has no right to place poles in the streets of said city,

except under the direction of the board of public works, though neither the council nor the board of public works has passed any ordinance or by-law regulating the placing of telephone poles in streets. City of Marshfield v. Wisconsin Telephone Co., 78 N. W. Rep. 735. But in the case of Michigan Telephone Co. v. Benton Harbor, 80 N. W. Rep. 386, the Supreme Court of Michigan held that Pub. Acts 1895, providing that municipal authorities may regulate or prohibit the use of telephone poles in the streets, does not repeal Acts 1883, providing that telephone companies may maintain wires, with necessary fixtures, along any street or highway in the state, which shall not injuriously interfere with its other public uses, since it only confers such authority on municipalities subject to the general law in reference to their streets.

A franchise granted to a telephone company of constructing and operating its lines along and upon streets is subordinate to the rights of the public in a street for the purpose of travel. Cincinnati Incline Plane Railroad Co. v. Telegraph Association, 12 L. R. A. 541. State legislation, therefore, compelling electric wires in the streets of a city to be placed under the surface of the streets is an exercise of the police power, and not an unlawful attempt to regulate commerce, or an invasion of the rights of a telegraph company. Western Union Telegraph Co. v. New York, 38 Fed. Rep. 552. But it was recently held that a grant to a telegraph company to run and maintain wires over and through streets does not include permission to lay them underground. Commonwealth v. Warwick, 185 Pa. St. 628. This case seems to lead to the dilemma of a company authorized by the state to maintain its wires over the streets being compelled by a municipality to do what they have no right to do under their charter, *i. e.*, to place them under the ground. But it is plain that a municipality cannot be permitted to act arbitrarily in a matter of this kind. Thus, an ordinance providing that no telephone wire shall be stretched across any public street without the consent of the township committee, was held not to be a regulation and restriction within the provisions of the statute giving to telephone companies the right to stretch wires over streets in incorporated cities and towns, under certain conditions, subject to such "regulations and restrictions" as may be imposed by the corporate authorities. Inhabitants of Summit Township v. Telephone Co. (N. J. 1898), 41 Atl. Rep. 146. And again, where an agreement between a city and telephone company as to the mode of use of its streets has expired by limitation, the city cannot oust the company from the use and occupation of the streets until it made to appear that no agreement can be made, and that the company, after such failure to agree, delays unreasonably to apply to the court to fix the mode of use, as prescribed by law. State v. The Central Union Telephone Co., 14 Ohio Cir. Ct. Rep. 272.

The point as to the constitutionality of municipal ordinance, requiring the removal of wires to underground conduits, does not seem to have been raised successfully. Thus, in the case of Geneva v. Telephone Co., 62 N. Y. S. 172, it was held that Laws 1897, authorizing board of public works of the city of Geneva to require telephone companies to move their wires from poles to underground conduits whenever it shall, by resolution, determine that public safety requires such removal, was not unconstitutional, as imposing taxation on such corporations without their consent, or opportunity of being heard.

One of the difficulties of this question is encountered in the construction of the acts of congress authorizing telegraph companies to erect and maintain their lines along the postroads of the United States. The question to what extent this authorization goes in interferring with the right of the state to regulate and maintain its own highways, has been very often raised. For instance, in the first place, it has been held that the Act of July 24, 1866, Rev. Stat., sec. 5263, authorizing telegraph companies to maintain and operate their lines along the postroads of the United States, but so as not to interfere with ordinary travel thereon, applies equally to telephone companies. City of Richmond v. Southern Bell Telephone & Telegraph Co., 85 Fed. Rep. 19. This case, however, was subsequently reversed and the act of congress under consideration held to have no application to telephone companies whose business is that of electrically transmitting articulate speech between different points. City of Richmond v. Southern Bell Telephone & Telegraph Co., 174 U. S. 761. This case seems to have authoritatively settled the question whether the phrase "telegraph companies" when used in this connection includes telephone companies as well. And again it was held that the right given by this statute is permissive only and subject to all state or local legislation regulating its exercise and such permission does not affect the right of a municipality in the exercise of its police powers to enact and enforce ordinances intended to promote the safety and convenience of the public in the use of its streets. Michigan Telephone Co. v. City of Charlotte, 93 Fed. Rep. 11. In a later case it was held that this act does not authorize compulsory proceedings to obtain a right of way over private property for such lines, and condemnation of such right of way can only be made by virtue of some law of the state where the property is situated. The very recent case of City of Toledo v. Telegraph Co., 107 Fed. Rep. 10, seems to have gone further than any other case on this subject, and ought to definitely settle the question of the rights of telephone and telegraph companies operating under the provisions of the act of congress of 1866. In this case it was held that an interstate telegraph company which had accepted the provisions of the act of 1866 was not entitled to erect and maintain its lines over the streets of a city without complying with the reasonable regulations of the city for the erection and maintenance of such lines and without procuring a permit therefor from the city.

It might be fairly stated to be the rule deduced from the authorities that telephone or telegraph companies operating under provisions of a statute giving them the right to place their wires and fixtures over the roads and highways of the state cannot be arbitrarily deprived of such right by municipal ordinance or regulation. Even where the municipality has power under its charter to regulate the placing of poles and other obstructions on the streets of the city, still such regulation or restriction must be reasonable, and the municipality is not the sole judge of that fact. But where the municipality has no such express power to regulate the use of the streets, it may still prohibit and order the removal of obstructions on the streets of the city under its general police power. But in this case also its action must be shown to be a reasonable exercise of the police power and necessary to protect the property, health or general welfare of the inhabitants of the municipality.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 79.

One of the most pleasant duties of the editor of the CENTRAL LAW JOURNAL, and one which he is called upon to undertake with increasing frequency, and, of course, increasing delight, is the review of each successive volume of the American State Reports. The seventy ninth volume of this excellent series of annotated reports, just received, is a conspicuous example of the superiorities of this series over others of similar character; first, in its judicious selection of only the best considered cases; second, in its learned and exhaustive monographic notes, treating only the latest and livest questions of law, and third, in its excellent workmanship, delighting the eye and suiting itself admirably to the needs and conveniences of the busy lawyer. Out of many exhaustive monographs we select the following as being of special interest: "What Marriages Are Void," p. 361; "When Does the Title of a Statute Embrace But One Subject, and What May be Included Thereunder," p. 456; "Title Acquired by Purchaser at His Own Execution Sale," p. 947; "What Words Create Conditions Subsequent," p. 747; "Partnership After Death," p. 709; "Constitutionality of Civil Service Laws," p. 560. Published by the Bancroft-Whitney Company, San Francisco, Cal.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNT STATED—Attorney and Client.—Where an attorney made out and delivered to his client a statement of his account for services rendered, showing an itemized schedule of debits and credits and the balance due, such account became an account stated, unless objected to within a reasonable time.—CRAWFORD v. HUTCHINSON, Oreg., 65 Pac. Rep. 84.

2. APPEAL—Findings of Court—Equity.—The findings of a court which tries a case without a jury, and without delegating its powers to a master or referee, is entitled to as much if not more consideration than the findings of a master or referee, and the judgment or decree will not be disturbed unless the evidence is manifestly insufficient to sustain it.—BADARACCO v. BADARACCO, N. Mex., 65 Pac. Rep. 153.

3. ATTORNEY AND CLIENT — Disbarment — Information.—The verification of an information in a proceeding to disbar an attorney may be made on information and belief, but the sources of affiant's information must be definitely stated.—IN RE VEEDER, N. Mex., 65 Pac. Rep. 180.

4. BANKRUPTCY — Allowance of Attorney's Fees.—Bankr. Act 1898 presupposes that attorneys employed to file a voluntary petition in bankruptcy will arrange with their client for the prepayment of their fees for the services required in the ordinary course of the proceedings, and the provision of section 64b, cl. 3, contemplates the allowance from the estate by the court, in its discretion, of additional fees for extraordinary services which may have been required from such attorneys, which should be fixed at such sum as is equitable in view of the fees already received and the rights of creditors.—IN RE SMITH, U. S. D. C., E. D. (N. Car.), 108 Fed. Rep. 39.

5. BILLS—Notes — Execution Purchaser.—An execution purchaser of a note takes it subject to all equities existing against it in the hands of the original maker.—NEALE v. HEAD, Cal., 65 Pac. Rep. 132.

6. BUILDING AND LOAN ASSOCIATIONS—Sale—Shareholder's Contract—Rescission—Vendor's Lien.—Where plaintiff executed a deed of trust to a building and loan association to take up a note for the purchase price of the lot, and to pay for material which had been used in erecting a building on it, and the association, without the consent of its stockholders, assigned its assets to defendant, and ceased business, the defendant was entitled, on plaintiff's rescinding his contract, to be subrogated to the vendor's lien, and to a foreclosure of the lien.—NORTH TEXAS SAV. & BLDG. ASSN. v. JACKSON, Tex., 68 S. W. Rep. 344.

7. BURGLARY—Evidence.—Where one witness in a prosecution for burglary testifies to having seen a man running from the burglarized house, evidence of another witness that defendant's shoes corresponded with tracks found at the place of the burglary is admissible, though it is not shown that the tracks were made by the man running from the house.—PEOPLE v. ROWELL, Cal., 65 Pac. Rep. 127.

8. CARRIERS—Relation of Carrier and Passenger—How Created.—The relation of carrier and passenger, which will bring a carrier under the obligation to exercise the high decree of care and caution for the safety of a person imposed by such relation, can only be created by contract, express or implied.—FARLEY v. CINCINNATI, H. & D. R. Co., U. S. C. C. of App., Sixth Circuit, 108 Fed. Rep. 13.

9. COMMISSIONER OF PUBLIC LANDS—Powers—Illegal Exercise—Injunction.—Plaintiff alleged that defendant, as commissioner of public lands, threatened to lease certain public land adjoining a city of which plaintiff was an inhabitant and taxpayer, and that the occupation of such lands by the lessees would contaminate the city water supply, and result in irreparable injury to the inhabitants of the city. Held, that the threatened injury was too remote to require a court of equity to inquire as to whether the threatened acts were within the exercise of the powers of the commissioner.—CITY OF TACOMA v. BRIDGES, Wash., 65 Pac. Rep. 186.

10. CONTRACT—Agreement to Support Another.—Where a conveyance was executed in consideration of the grantee's agreement to support an imbecile sister of the grantors, he cannot refuse to furnish that support because the imbecile refuses to remove with him to another state, as he is bound to furnish the support under such reasonable circumstances as may best conduce to her comfort and convenience.—LAIN v. MORTON, Ky., 68 S. W. Rep. 286.

11. CORPORATIONS — Collateral Security — Pledgee—Right of Action.—Certificates of stock, assigned as security for an indebtedness, give the holder, as pledgee of the stock, a right to maintain an action to compel defendant corporation to recognize it as a stockholder, after an illegal levy of assessments on the stock and sale thereof for delinquency.—HERBERT KRAFT CO. BANK v. BANK OF ORLAND, Cal., 65 Pac. Rep. 144.

12. CRIMINAL EVIDENCE — Homicide—Self-Defense—Dying Declarations.—Where defendant shot deceased as the latter was crawling toward defendant's house, and defendant testified that he hailed deceased, and the latter made a move as if to draw a pistol, deceased's dying declaration that he had no weapon was admissible as a part of the *res gestæ*.—GRUBB v. STATE, Tex., 63 S. W. Rep. 314.

13. CRIMINAL LAW—Alibi — Instruction.—An instruction that the plea of alibi merely traverses the issue tendered in the indictment, and is not an independent fact, and therefore the burden of proof is not on the defendant to establish it, was properly refused.—SAENZ v. STATE, Tex., 63 S. W. Rep. 316.

14. CRIMINAL LAW—Court's Jurisdiction.—Under the general laws of Texas, the county court has concurrent jurisdiction with the justice courts over all misdemeanors that said courts have jurisdiction to finally try.—BRADY v. STATE, Tex., 63 S. W. Rep. 327.

15. CRIMINAL LAW — Larceny — Fraudulent Intent.—Where defendant sold a horse, which he did not own, to an innocent purchaser, who afterwards took possession of it in another county, the fact that the purchaser had no fraudulent intent, when taking the horse, is not a defense to defendant, when charged with larceny of the horse, since defendant had the fraudulent intent, and the purchaser was acting as defendant's agent.—WALLS v. STATE, Tex., 63 S. W. Rep. 328.

16. CRIMINAL LAW—Murder in First Degree—Alibi.—An instruction that the burden of showing an alibi is on the defendant, but, if the testimony in the whole case raises a reasonable doubt of defendant's presence when the crime was committed, he should be acquitted, is not erroneous as shifting the burden on defendant to show his innocence.—RAYBURN v. STATE, Ark., 63 Pac. Rep. 856.

17. CRIMINAL LAW—Theft—Sufficiency of Evidence.—Prosecutor engaged in a game of poker with five strangers, one of whom, the defendant, was dealing the cards. During the course of the play, defendant dealt prosecutor four aces and another four kings. Defendant then went out, and another took his place as dealer. When it came to a "showdown," prosecutor stated what he held, but declined to show his hand. One of the others then grabbed his cards, saying, "You have got a foul; you have six cards;" and on placing them on the table there were six cards. Thereupon the players grabbed for their money, prosecutor failing to get any. Prosecutor testified that he had five cards until the player grabbed his hand, and that he thought that defendant was present, and joined in the grabbing. All the other witnesses testified that they did not see defendant present or grab for money. Held, that the evidence was insufficient to sustain a conviction for theft.—HERNANDEZ v. STATE, Tex., 63 S. W. Rep. 320.

18. CRIMINAL TRIAL—Counsel — Sickness — Intoxication—Continuance.—Where the sickness of defendant's leading counsel was voluntarily produced by the use of intoxicating liquor, and defendant was represented at the trial by able counsel, it was not error to refuse a continuance.—COLEMAN v. STATE, Tex., 63 S. W. Rep. 322.

19. DIVORCE — Validity—Collateral Attack.—The objection that a decree of divorce is void, because the parties thereto were not residents of the state when the divorce was granted, cannot be raised to defeat the confirmation of the report of commissioners in a suit by the wife to partition community property, since such questions were passed on by the court granting the divorce.—MOOR v. MOOR, Tex., 63 S. W. Rep. 347.

20. EVIDENCE — Dying Declaration.—A statement that the accused and others were skinning or killing a beef when declarant found them, whereupon accused shot declarant, is admissible as part of a dying declaration as tending to show a motive for the shooting, where the beef had evidently been stolen.—MEDINA v. STATE, Tex., 63 S. W. Rep. 331.

21. EVIDENCE—Federal Census.—The federal census is competent evidence to prove the population of a county.—STATE v. NEAL, Wash., 65 Pac. Rep. 188.

22. FIRE INSURANCE — Policy — Dwelling House.—Where, in an action on a fire policy on a building "while occupied as a dwelling house," the complaint fails to allege that the building was so occupied at the time the fire occurred, the complaint does not state a cause of action, since there could be no recovery unless such fact was proved, and the facts necessary to be proved must be alleged.—ALLEN v. HOME INS. CO. OF NEW YORK, Cal., 65 Pac. Rep. 138.

23. FRAUD—Presumptions.—Where the facts upon which fraud is predicated consist as well with honesty as with dishonesty, the law presumes in favor of honesty.—FIRST NAT. BANK OF ALBUQUERQUE v. LESSER, N. Mex., 65 Pac. Rep. 179.

24. FRAUD—Special Deposit—Fraud of Depositor.—A complaint alleging that plaintiff made a special deposit with defendant bank, to be loaned on real estate, but that the bank loaned it to H without any security, and knowing that he was insolvent, is sufficient to support that a recovery for fraud on the part of the bank in procuring H, who was indebted to it, to execute a new note to plaintiff, and thereupon transferring the amount of the loan from the plaintiff's account to that of the bank.—LARSEN v. UTAH LOAN & TRUST CO., Utah, 65 Pac. Rep. 208.

25. FRAUDULENT CONVEYANCE — Debts of Husband—Liability.—Land levied on by plaintiff was conveyed to the wife by a third person. The execution creditor, though he could easily have obtained knowledge of the wife's title, made no attempt to gain possession until more than five years had expired after the conveyance. Held, that he was not then entitled to maintain a motion for possession on the ground that the property had been fraudulently conveyed to the wife to defraud her husband's creditors, since, if any fraud existed, the creditor did not use ordinary diligence to discover the same.—GREEN v. SALMON, Ky., 63 S. W. Rep. 270.

26. HABEAS CORPUS—Custody — Appeal.—Defendant sued out a writ of *habeas corpus*, and was remanded to custody, whereupon he appealed. Instead of being retained in custody, he was given his freedom on a recognizance. Held, that the appellate court had no jurisdiction of the defendant, and his appeal must be dismissed.—EX PARTE MCMINN, Tex., 63 S. W. Rep. 322.

27. HOMICIDE — Judgment — Sentence — Death Warrant.—Ballinger's Ann. Codes & St. §§ 6993, 6996, prescribe the proceedings to be taken when judgment of death is rendered, and include the provision that "the judge shall appoint a day for the execution which shall not be less than 30 nor more than 90 days from the time of judgment, and the sheriff or officer to whom a death warrant is delivered shall return the same within 20 days after the time fixed for execution." Act March 8, 1901, relating to the death warrant, the contents thereof, the return, and fixing the place of execution, amended sections 6993, 6995, *supra*. Held, that *mandamus* would lie to compel the judge of the superior court to issue a death warrant against a defendant convicted before the amendment, though the day fixed therein would necessarily be after the amendment took effect.—STATE v. SUPERIOR COURT OF PIERCE CO., Wash., 65 Pac. Rep. 183.

28. HOMICIDE —Murder—Acquittal—Manslaughter.—Where defendant was acquitted of murder, and convicted of manslaughter, and on appeal the judgment was reversed, he was not entitled in the succeeding trial to an instruction to acquit him of the charge of manslaughter, if the evidence showed him to be guilty of murder.—PICKETT v. STATE, Tex., 63 S. W. Rep. 325.

29. HOMICIDE — Self-Defense — Several Assailants.—

Where the evidence shows that it may have appeared to defendant that he was in danger of his life or of serious bodily harm from more assailants than one, acting together, an instruction on self-defense, failing to charge that defendant had a right to defend against and to kill either assailant, is erroneous.—SEELEY v. STATE, Tex., 63 S. W. Rep. 309.

30. INDICTMENT—Conspiracy to Defraud the United States—Description of Offense.—An indictment under Rev. St. § 5440, charging a conspiracy to defraud the United States by depriving it of the title to certain lands by means of a fraudulent entry under the homestead laws, which avers that the entry was made, and that by means of it the accused obtained possession of the land, and cut the timber thereon, is sufficient, and need not allege that the land was subject to homestead entry. The conspiracy constitutes the offense, and it need not be shown how the overt act tended to effect its purpose, or that it was successful.—GANTT v. UNITED STATES, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 61.

31. INSURANCE—Premiums — Non- ayment—Forfeiture.—Where a life insurance policy called for an annual premium, non-payment of which forfeited the policy, but provided that the assured might, with the consent of the company, pay the premium in quarterly installments, the assured, having chosen the latter method, was bound thereby, and the policy was forfeited by his failure to pay the installments, though there was no provision in the policy regarding forfeiture for non-payment of installments.—NIXON v. TRAVELERS' INS. CO. OF HARTFORD, CONN., Wash., 65 Pac. Rep. 195.

32. JUDGMENT — Amount — Remittitur.—Where the judgment is in excess of plaintiff's demand as shown by his pleadings, it will be reversed, unless remitted to the amount claimed.—TEXAS & P. RY. CO. v. MITCHELL, Tex., 63 S. W. Rep. 336.

33. JURY—Discussion—Defendant's Failure to Testify.—Where jurors discussed the failure of defendant, charged with arson, to testify, and some of the jurors attempted to explain such failure, there was reversible error.—BUESSING v. STATE, Tex., 63 S. W. Rep. 318.

34. LANDLORD AND TENANT—Lien for Rent—Tenant's Goods Retained.—Where plaintiff claimed a landlord's lien on a safe left on his premises as against purchasers thereof from the tenant, the issue as to whether or not there was any rent due to plaintiff should have been submitted to the jury.—MYAR v. EL PASO GROCERY CO., Tex., 63 S. W. Rep. 337.

35. LANDLORD AND TENANT — Rent — Action—Judgment.—Where defendant leased plaintiff's premises for one year, paying one month's rent in advance, and at the expiration of the month offered to surrender the premises, which plaintiff refused, an action to recover the second month's rent in advance, decided against plaintiff, and in which the only material issue was the validity of the lease, was a bar to an action after the expiration of the year to recover rent, since, the defendant not having been in use and occupation, recovery would necessarily depend on the lease.—DOLAN v. SCOTT, Wash., 65 Pac. Rep. 190.

36. LIFE INSURANCE—Failure to Pay Premium Note at Maturity—Waiver of Forfeiture.—Neither the fact that the company retained the notes nor the fact that insured retained the policies amounted to a waiver of forfeiture, the insured having the right to a reinstatement of the insurance upon certain conditions, and the company therefore having no right to demand a return of the policies.—MANHATTAN LIFE INS. CO. v. SAVAGE'S ADMR., Ky., 63 S. W. Rep. 278.

37. LIS PENDENS—Sale Pendente Lite — Purchaser's Liability.—Where plaintiff seized property under a writ of sequestration, and it was replevined by defendants and sold to C *pendente lite*, and plaintiff obtained judgment in the replevin suit, the fact that C purchased for other parties did not prevent the judgment from being binding on him.—SOUTHERN ROCK ISLAND PLOW CO. v. PITLUK, Tex., 63 S. W. Rep. 354.

38. LOAN TO PAY INTEREST ON MORTGAGE COUPONS—Lender's Right to Preference over Mortgage.—That money was borrowed to pay interest on matured railroad mortgage coupons is no ground for giving the lender a preference over the mortgage; and this, though the loan was necessitated in part by the application of current income to the payment of the purchase money for locomotives which become subject to the mortgage under an after-acquired property clause.—CONTRACTING & BUILDING CO. OF KENTUCKY v. CONTINENTAL TRUST CO. OF NEW YORK, U. S. C. C. of App., Sixth Circuit, 108 Fed. Rep. 1.

39. MASTER AND SERVANT.—Where laborers were furnished by an employment agency to a railroad promoter, and such laborers committed a trespass on plaintiff's land, and cut timber thereon without right, under the impression that the land was a part of the right of way, the employment agency could not be rendered liable for the trespass under the doctrine that a master who hired his servants to another is nevertheless liable for their negligence, he being responsible for employing unqualified and careless persons, since the injury did not result from any negligence in the selection of the laborers hired to the promoter.—SWACKHAMER v. JOHNSON, Oreg., 65 Pac. Rep. 91.

40. MASTER AND SERVANT—Injury to Employee—Negligence of Fellow-Servant.—Where a servant was not negligent, the master was liable if negligent, if such negligence was the cause of the injury to the servant, though the negligence of plaintiff's fellow-servant may have contributed to the injury.—TEXAS & P. RY. CO. v. MAUPIN, Tex., 63 S. W. Rep. 346.

41. MECHANICS' LIENS—Fees of Master—Sale under Decree.—A master who incurs expenses by having drawn up a notice of sale, etc., before the time limited for the redemption of property has expired, does so at his own risk, and cannot recover back such expenses, if the mechanics' liens for which the sale was to be made are paid before the expiration of the time limited for redemption.—NEHER v. CRAWFORD, N. MEX., 65 Pac. Rep. 156.

42. MECHANICS' LIENS—Foreclosure.—Where miners perform labor for the lessee of a mine under a contract with him alone, they are not entitled, under Rev. St. par. 2276, to a judgment against the owner of the fee, foreclosing mechanics' liens on the freehold.—GRIFFIN v. HURLEY, Ariz., 65 Pac. Rep 147,

43. MORTGAGES—Deficiency—Judgment—Transfer of Mortgage—Personal Liability.—Where the mortgagor conveyed the premises to one who assumed the mortgage, which fact was known to the mortgagee, who agreed in writing with such grantee that the time for payment should be extended, it was error to enter deficiency judgment against the mortgagor, since the mortgagor stood in the relation of surety, and was therefore discharged from personal liability.—HERD v. TUOHY, Cal., 65 Pac. Rep. 139.

44. MORTGAGE—Undertaking to Pay Mortgage.—A deed conveying about 100 acres of land, which recites that the grantees undertake to support the grantors for life, and that it is understood that the grantees are to pay off a certain mortgage "on 25 acres of land hereby conveyed, in addition to the foregoing," creates a lien on the entire tract conveyed to secure the payment of the mortgage debt.—FISHER v. HALL'S EXR., Ky., 63 S. W. Rep. 287.

49. PLEADING AND PRACTICE—Misjoinder of Defendants—Waiver by Failure to Object before Trial.—After a defendant files pleas to the merits, and goes to trial, and remains silent till evidence is offered which entitles plaintiff to judgment on the issues, it is too late to make an objection for misjoinder of parties defendant which he could have made before.—UNITED STATES v. AGEE, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 10.